APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
NO. 80-2083
Filed April 13, 1982

PUEBLO AIRCRAFT SERVICE, INC., a Colorado corporation,
Plaintiff-Appellant,

v.

THE CITY OF PUEBLO, COLORADO, a Municipal corporation, THOMAS LOPEZ, Individually and as Director of Aviation for the City of Pueblo, PAN-ARK AVIATION, INC., a Colorado corporation, and GEORGE RABATIN, JR.,
Defendants-Appellees.

filed April 13, 1982
Appeal From the United States District Court
For the District of Colorado
(D.C. No. 77-HC-1049)

Alan L. Sulzenfuss, Salida, Colorado (Maurice R. Franks, Pueblo, Colorado, with him on the brief), for Plaintiff-Appellant.
Thomas E. Jagger, Pueblo, Colorado (Joseph A. Vento of Kettelkamp, Vento & Brown, Pueblo, Colorado, with him on the briefs), for Defendants-Appellees.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judge

BARRETT, Circuit Judge.

This is an action involving alleged federal antitrust act violations brought by plaintiff-appellant, Pueblo Aircraft Services, Inc. (Pueblo Aircraft) under 15 U.S.C.A. §§ 1 [1] and 14 [2] against the City of Pueblo, Colorado (City), Thomas Lopez, City's Director of Aviation, Pan-Ark Aviation, Inc. and George Rabatin, Jr., arising from City's operation of a municipal airport.

The district court granted the defendants-appellees' motion for summary judgment, finding/concluding that City is immune from the federal antitrust laws and further that no genuine claim is stated against the other defendants-appellees. The trial court pertinently observed after finding/concluding that City is immune from federal antitrust laws, that if this conclusion is correct, no further consideration of the summary judgment motions is necessary "[s]ince all antitrust claims of the plaintiff against all the remaining defendants are based on

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1/ 15 U.S.C.A. §1 provides in pertinent part: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal."

2/ 15 U.S.C.A. §14 provides in pertinent part: "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption, or resale within the United States. . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods,wares merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

alleged violations by the City of the Federal antitrust laws. . ." [R., Vol. I, p. 182]. Thus, the district court dismissed the suit with prejudice as to all defendants on the ground that no claim had been stated upon which relief can be granted. The court granted summary judgment based upon extensive pleadings, voluminous depositions, documents, affidavits filed in support of and in opposition to the motions, briefs of the respective parties, and an open court hearing.

We approach this review aware that summary procedure should be used sparingly in antitrust litigation, *Poller v. Columbia Broadcasting*, 368 U.S. 464 (1962), and that summary judgment should issue only where there is no genuine issue of material fact. *Harman v. Diversified Medical Investments Corporation*, 488 F.2d 111 (10th Cir. 1973), *cert. denied*, 425 U.S. 951 (1979). Factual inferences tending to show triable issues of material fact should be viewed in the light most favorable to the existence of such issues in assessing a motion for summary judgment. *Harsha v. U.S.*, 590 F.2d 884 (10th Cir. 1979).

Facts

The facts stated most favorably to Pueblo Aircraft are as follows. In 1948 City acquired from the federal government by deed a tract of land which had been used as a military airfield during World War II, granted for the specific purpose of establishing a municipal airport. At the time of acquisition, there were certain facilities available to City on the premises for airport operations including hangars and a storage facility to store aviation fuel. Since prior to 1970, City granted leases to three "fixed base operators" who operated businesses upon specific portions of the airport lands so leased and performed specific services which were monitored by City, including refueling of aircraft, sale of new and used aircraft, repair and maintenance of aircraft,

sale of aircraft parts and supplies, rental and charter of aircraft, conduct of a flying school, operation of food vending machines, storage of aircraft, and the manufacture of aircraft parts and components. The lease agreements with each of the "fixed base operators" 3/ required them to purchase all aviation fuel from City for resale. 4/ The three fixed base operators were defendants Pan-Ark, Flower Aviation and the plaintiff-appellant, Pueblo Aircraft.

In 1970, Willard J. Teel and Betty I. Teel acquired all of the stock of Pueblo Aircraft and thereafter actively managed a fixed base operation under the lease granted by City, which expired on March 31, 1977, but was extended to June 31, 1977.

Several months prior to the expiration of Pueblo Aircraft's lease, City determined to require public bidding for the lease, upon its termination, of the premises and improvements leased to Pueblo Aircraft. The only bidders were Pueblo Aircraft and Pan-Ark. Pan-Ark was declared the successful bidder and City authorized a lease of the premises formerly occupied by Pueblo Aircraft to Pan-Ark commencing July 1, 1977.

At all times since the acquisition of the airport, City has

3/ A fixed base operation is one that requires the operator who enters into a lease agreement-contract with City to provide specific facilities, services, equipment and personnel to meet the requirements for certain operations of an airport used by aircraft, passengers, crews and freight shippers. In most cases, the leases included those portions of the airport premises with hangars and other improvements thereon where the services and supplies are performed and kept.

4/ The lease agreement proviso, as modified on August 2, 1974, reads: "Lessee agrees to purchase from the City all aviation gasoline or propellants dispensed through Lessee's operation at the City's cost, plus five and one-half cents (5-½ cent) per gallon. Lessee shall be billed monthly for all gasoline purchased during the month, and such bills shall be due and payable upon billing."

been a "home rule" city, chartered pursuant to Art. XX, Section 6 of the Colorado Constitution which permits City to exercise "the full right of self-government in both local and municipal matters" and provides that the charter or ordinances enacted by City pursuant to such authority shall supersede the statutes of Colorado in exercising self-government.

City, at all times following acquisition of the airport, assumed control and responsibility for providing and maintaining the storage facility, monitoring the quality of fuel, providing fire protection and assuring the supply of aviation fuel to serve the needs of the fixed base operators and other aircraft using the airport who were not supplied by the fixed base operators. All leases entered into between City and the fixed base operators required the operators-lessees to purchase all aviation gasoline or propellants dispensed by them from City. The storage facility was on the premises when the property was acquired by the City. It was an underground fuel storage facility located away from the buildings and ramp area, and City daily monitored the fuel in order to assure its quality before it was dispensed to the fixed base operators. The City purchased the fuel through competitive bidding. At no time did any fixed base operator offer to construct its own storage facility on the airport premises so as to obtain aviation fuel independent of City.

Trial Court's Ruling

The district court found/concluded that City is immune from the federal antitrust laws primarily by virtue of its status as a "home rule city" chartered pursuant to Article XX, Section 6 of the Colorado Constitution. The court relied on *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980) as authority for the proposition that City's operation and management of the airport was exempt from federal antitrust laws by virtue

of its power and authority as a "home rule" city. In *Community Communications Co. v. City of Boulder*, ____ U.S. ____, 50 U.S.L.W. 4144 (January 13, 1982) the Supreme Court reversed our decision reported in 630 F.2d 704, *supra*, and held that an ordinance enacted pursuant to Colorado's "home rule" authority does not constitute municipal action exempting it from antitrust scrutiny because it does not constitute municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy as enunciated in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Parker v. Brown*, 317 U.S. 341 (1943). The parties agree here that in light of *Community Communications Co. v. City of Boulder, supra*, the district court's reliance on the "home rule" status of City for exemption from antitrust scrutiny must fail.

However, the district court alternatively relied on a specific statutory authorization granted to City as a further ground for its immunity determination. The court found that the State of Colorado has specifically authorized City to acquire and operate a municipal airport and that such acquisition and operation "are hereby declared to be public, governmental functions, exercised for a public purpose and matters of public necessity" by virtue of C.R.S. 1973 §41–4–101 which provides:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other

> powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

The district court concluded, then, that City, in its dealings with the fixed base operators, "is immune from the Federal antitrust laws", and, because all antitrust claims of Pueblo Aircraft against all other defendants were necessarily based on alleged violations by City, the immunity of City required granting of summary judgment motions of dismissal with prejudice as to all defendants. However, in an abundance of caution, the trial court determined it desirable, should its ruling on City's immunity be reversed on appeal, to address all other questions raised by the summary judgment motions. The court thereupon, in detail, addressed and ruled upon each of Pueblo Aircraft's remaining antitrust claims and found/determined that each was without substance, and that there were no specific facts showing that there were any genuine issues for trial as to any claims against the remaining defendants. We agree. We rely upon the district court's detailed opinion and order of September 26, 1980, in affirming the district court's grant of summary judgment to the remaining defendants.

Our Disposition

The sole issue we shall discuss on appeal is whether the

district court erred in finding/concluding that City is immune from the federal antitrust laws in its dealing with the fixed base operators in the operation of the municipal airport.

In *Community Communications Co. v. City of Boulder, supra,* the Supreme Court made it clear that a municipality is not exempt from the antitrust laws unless it constitutes the action of the state itself or was municipal action in furtherance or implementation of state policy by means of a "clear articulation and affirmative expression" contemplating a municipality's anticompetitive program. The Court stated, *inter alia:*

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker,* or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette, Orrin W. Fox Co.,* and *Midcal.* . .
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> . . . When *Parker* examined Congress' intentions in enacting the antitrust laws, the opinion noted that "nothing in the language of the Sherman Act or in its history. . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature.* . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." 317

U.S., at 350-351 (emphasis added). . . .

* * *

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.
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> 50 U.S.L.W. pp. 4146, 4147.

In keeping with the commands of *Community Communications Co. v. Boulder, supra,* the key inquiry, we believe, is whether the State of Colorado by affirmative legislative action granted City an exemption from operation of federal antitrust laws by virtue of the statutory language contained in C. R. S. 1973, §41–4–101, *supra.* We hold that it does. We affirm the district court.

In *Lafayette v. Louisiana Power & Light Co., supra,* the Supreme Court held that in order to find that a subordinate state governmental body is exempt from the operation of federal antitrust laws it must be found that the state legislature contemplated certain type of anticompetitive restraint

in authorizing the subordinate body to perform and engage in certain activity and, pertinently, that it is not necessary to point to express statutory mandate for each act that is alleged to violate the antitrust laws, and that it will suffice if the activity in issue is found to be clearly within legislative intent.

In E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966), suit was brought under the federal antitrust laws against the Port Authority and a fixed base operator at Boston's Logan Airport, alleging an antitrust conspiracy in forcing the plaintiff, who previously held a fixed base operator's lease at the airport which the Authority had refused to renew, to sell its business and equipment at the airport to the new fixed base operator at a minimal figure. The plaintiff sought damages pursuant to the Sherman Act from the Port Authority and the new fixed base operator. In affirming the district court's judgment dismissing the complaint, the court said, *inter alia:*

> By statute it [the Port Authority] has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. . . As stated by the Massachusetts Supreme Judicial Court in Opinion of the Justices, 334 Mass. 721, 731, 136 N.E.2d 223 (1956), the Authority "is in no sense a private or business corporation * * It has no stockholders. No person can derive a profit through its operations. Only the public is to be benefited * * "
>
> It is described in the act creating it as "a body politic and corporate" which expression

the Court said "is appropriate to a corporation to which is entrusted some of the powers of the State for public purposes". . . The court also characterized the Authority "as a purely public corporation for public purposes - - an arm of the State - - analogous to a municipal corporation." Logan Airport is and always has been a public project.

In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with Butler-Boston. *It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport. . . . Plaintiff's contention that the Authority in operating Logan Airport is engaged in a purely proprietary capacity and is conducting a private business has no merit. Nor does the arrangement with Butler-Boston violate the Sherman Act. What was done here was in the exercise of a valid governmental functions. The anti-trust laws are aimed at private action, not at governmental action.* As stated by the Supreme Court in *Parker v. Brown* . . . "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature * * * The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state * * *."

362 F.2d at pp. 55, 56. [Emphasis supplied]. [Footnotes omitted].

In *Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361 (10th Cir. 1972), we pointed out that *Parker v. Brown, supra*, involved a California statute which authorized the establishing, through action of state officials, of programs for marketing of agricultural commodities produced in the state in such a way as to restrict competition among the growers and to maintain prices in the distribution of their commodities to packers. This act authorized the formation of marketing combinations comprised of a number of producers within a particular district. Our court emphasized that, although the combination involved private individuals, it was unquestionably formed under authority of state law and for the purpose of advancing a state economic program, and consequently. . . "it was indeed state action" 456 F.2d at p. 1366.

Semke recognized . the "state action" exemption under facts and circumstances encompassing private or individual "proprietary" gains deemed to be important in the advancement of a state's economic program. It seems that the recognition of exemption from the antitrust laws under such circumstances mandates recognition of the exemption to City in the case at bar.

In *Rocky Mountain Motor Co. v. Airport Transit Co.*, 235 P.2d 580 (Colo. 1951), the Court held that the City of Denver, in establishing its municipal airport by virtue of a special 1929 ordinance whereby the operation of the airport was assigned to the city's Department of Improvements and Parks was acting in a proprietary rather than a governmental capacity. Significantly, however, the Colorado Supreme Court pointed out that it was not until 1945 that the Colorado legislature enacted legislation declaring the operation of publicly owned airport facilities to be a govern-

mental function. Having done so, the court referred to those airports being operated under authority of the statute as those operated as a ". . . governmental function assigned to it to enforce the general policy of the state in the administration of general laws." 238 P.2d at P. 586.

In *Duff v. City and County of Denver*, 362 P.2d 1049 (Colo. 1961), the Court held that a state statute authorizing the condemnation of private lands by eminent domain proceedings by counties, cities and towns was in recognition of the public necessity and public purpose ". . . for the installation of necessary Airport facilities, such as service roads, aircraft taxiways, airplane parking appurtenances, airplane hangars, airplane shopping facilities, and other similar appurtenances to the Airfield." 362 P.2d at P. 1050.

In its "governmental capacity" a municipality acts as an arm of the state for the public good on behalf of the state rather than itself. *See: Schwalb v. Connely*, 179 P.2d 667 (Colo. 1947) (recognizing immunity of city from liability in operation of general hospital it owned and operated by virtue of power delegated to it by state for welfare and protection of inhabitants); *Kirksey v. City of Fort Smith*, 300 S.W.2d 257 (Ark. 1957) (airport operation and maintenance under state statute declaring such operation to be a governmental function).

Those courts which have held the ownership, maintenance and operation of a municipal airport to be a "proprietary function" instead of a "governmental function" have generally done so in the absence of a statute such as C.R.S. 1973, §41–4–101, *supra*, and have found that the municipality acts mainly for its own ends, purposes and benefits, separable from and in addition to any burdens and benefits imposed or conferred by the state government. In the absence of an express statutory direction, such as that contained in C.R.S. 1973, §41–4–101, *supra*, the operation of a

municipal airport is generally regarded as a proprietary function rather than a governmental function. *See* 56 Am. Jur. 2d, §§199, *et seq*, 66 A.L.R.2d 634; 25 A.L.R.2d 1048; 141 A.L.R. 1440.

The primary duty of the courts is to seek out and ascertain the legislative intent. Where the language of the statute is clear, plain and unambiguous, the duty of interpretation does not arise and rules designed to aid doubtful meanings do not come into play. Here, the Colorado legislature, by virtue of C.R.S. 1973, §41–4–101, *supra*, has expressly declared the operation of the airport facilities" . . . to be public governmental functions, exercised for a public purpose, and matters of public necessity. . . ." In *Hannon v. City of Waterbury*, 136 A. 876 (Conn. 1927) the court identified two distinct categories of governmental functions of a municipality - - one, those duties imposed or authorized by the state for "the benefit of the general public" and the other, those duties which are "for the particular advantage of the inhabitants of the municipality, and only . . . indirectly for the benefit of the people at large." *See also: Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898). Clearly, City's airport is one operated for the benefit of the general public and not for particular advantage of the inhabitants of the City of Pueblo. This is best evidenced by the following allegation contained in Pueblo Aircraft's complaint:

> 6. PUEBLO MEMORIAL AIRPORT is a major airport located on major crosscountry interstate air routes and is utilized by local and interstate private aircraft and passengers, local and interstate commercial aircraft and passengers, and by United States military aircraft and personnel. PUEBLO MEMORIAL AIRPORT is the largest facility for refueling aircraft along the route of V-244 between Salina, Kansas and San Francisco, California.

V-244 is a major air route connecting San Francisco with the Eastern United States.

[R., Vol. I, pp. 1, 2].

WE AFFIRM.

APPENDIX B

DENIAL OF REHEARING

MAY TERM - May 28, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

PUEBLO AIRCRAFT SERVICE, INC., a Colorado corporation,

Plaintiff-Appellee,

vs.

THE CITY OF PUEBLO, COLORADO, a municipal corporation, THOMAS LOPEZ, individually and as Director of Aviation for the City of Pueblo, PAN-ARK AVIATION, INC., a Colorado corporation, and GEORGE RABATIN, JR.

Defendants-Appellees

No. 80-2083

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no

member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 77–HC–1049

PUEBLO AIRCRAFT SERVICE, INC.,
a Colorado corporation,

Plaintiff,

vs.

THE CITY OF PUEBLO, COLORADO,
a Municipal corporation,
THOMAS LOPEZ, individually and
as Director of Aviation for
The City of Pueblo, PAN-ARK
AVIATION, INC., a Colorado
corporation, GEORGE RABATIN, JR.,

Defendants.

Filed September 26, 1980

Mr. Alan J. Sulzenfuss, Attorney at Law. P. O. Box 1003, 222 "E" Street, Salida, Colorado 81201, for Plaintiffs, and Mr. Maurice Franks, Attorney at Law, Airport Executive Center, 444 Keeler Parkway, Pueblo, Colorado 81001, for Plaintiffs.

Mr. David A. Cole, Assistant City Attorney, and Mr. Thomas E. Jagger, Attorney at Law, 127 First National Bank Building, Pueblo, Colorado 81003, for Defendants, City of Pueblo and Thomas Lopez.

Kettelkamp and Vento, Attorneys at Law, 540 United

Bank Building, Pueblo, Colorado 81003, for Defendants, Pan Ark Aviation, Inc., and George Rabatin, Jr.

OPINION AND ORDER

CHILSON, Judge

Preliminary Statement

This action arises out of the operation of a municipal airport by the City of Pueblo.

Since prior to the year 1970, various services, such as the refueling of aircraft, repair of aircraft, etc., were performed at the airport by three "fixed base operators" operating under leases from the City.

The three fixed base operators were the defendants, Pan Ark, Flower Aviation, and the plaintiff, Pueblo Aircraft Service, Inc.

In 1970, Willard J. Teel and Betty I. Teel acquired all of the stock of the plaintiff and thereafter managed and operated the business carried on under the lease to the plaintiff.

Plaintiff's lease expired by its terms on March 31, 1977, and was extended to June 31, 1977.

Several months prior to the expiration of plaintiff's lease, the City determined to require public bidding for a lease of the premises then leased to plaintiff. Plaintiff and Pan Ark were the only bidders. Pan Ark was declared to be the successful bidder and the City Council authorized the lease of said premises to Pan Ark on June 21, 1977, to commence on July 1, 1977.

Thereupon, plaintiff commenced this action seeking to

recover damages based on certain claims under state law and other claims based on alleged violations of the Federal Antitrust laws.

The state claims were dismissed by the Court leaving for determination only the antitrust claims of the plaintiff and the defendants' claim that the City is immune from the Federal Antitrust laws.

Plaintiff's claims are designated in the pre-trial order as the plaintiff's First, Second, Fourth Claim (A), Fourth Claim (B), and Fifth Claim.

After the pre-trial order was entered, the claims against Flower Aviation were dismissed upon joint motion of Flower Aviation and the plaintiff.

Thereafter, the remaining defendants, City of Pueblo, Lopez, Pan Ark, and George Rabatin, Jr., filed motions for summary judgment of dismissal of the claims against them which motions are now before the Court for determination.

Briefs in support of an in opposition to the motions were filed supported by various affidavits, documents, and voluminous depositions. A hearing on the motions was had in open court on September 9, 1980.

The Court has read and considered the motions and the documentary evidence filed in support of and in opposition to the motions and has considered the oral argument of counsel.

By the pleadings and the summary judgment motions, defendants contend the City of Pueblo is immune from the Federal Antitrust laws. We address this question first.

IMMUNITY

The pertinent uncontroverted facts are that the City in 1948 acquired from the Federal Government a tract of land which the Government had used as a military airfield during World War II. The City acquired the property for the specific purpose of establishing a municipal airport.

At the time of its acquisition, certain facilities for airport operations existed on the premises, including, among other things, hangars and a storage facility to store aviation fuel.

The deed from the Government to the City contained a provision that no exclusive right for the use of the airport shall be vested in any person to the exclusion of others in the same class including:

> "Any exclusive right to engage in the sale or supplying of aircraft, aircraft accessories, equipment, or supplies (excluding the sale of gasoline and oil), or aircraft services necessary for the operation of aircraft (including the maintenance and repair of aircraft, aircraft engines, propellers, and appliances.)" (Affidavit of Fred E. Weisbrod, Exhibit No. 1)

In 1945, the State Legislature enacted a statute providing in pertinent part:

> "Section 1. The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air

navigation facilities, and the exercise of any other powers herein granted to any county, city and county, city or town, are hereby declared to be public, governmental functions, exercised for a public purpose, and matters of public necessity, and such lands and other property, easements and privileges acquired and used in the manner and for the purposes enumerated in this act shall and are hereby declared to be acquired and used for public purposes and as a matter of public necessity." (1945 Session Laws, p. 38.)

Prior to, and at all times since the acquisition of the airport, the City of Pueblo was a "Home Rule" City, chartered pursuant to Article XX, Section 6 of the Colorado Constitution, which provides in pertinent parts:

"Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town are hereby vested with and they shall always have power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith. - - -

"It is the intention of this article to grant

> and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

After acquisition of the airport, the City elected to provide certain necessary and essential services and supplies by leasing portions of the airport and the hangars and other improvements located thereon to fixed base operators who would provide those supplies and services to those using the airport. Specifically the leases provided:

> "D. The City hereby grants unto the Lessee the following rights and privileges subject to the Rules and Regulations governing the Pueblo Memorial Airport set forth by the City, the State of Colorado, or the Federal Aviation Agency:

1. To sell new and used aircraft.
2. To conduct a school for the purpose of teaching others to fly.
3. To rent aircraft to others.
4. To charter aircraft.
5. To rent automobiles belonging to responsible automobile renting companies; i. e., Hertz, Avis, National.

6. To sell in the demised premises, soft drinks, candy and tobacco from coin operated vending machines but not food or food products.
7. To dispense aviation and automobile gasoline and lubricants or propellants in accordance to (sic) the rules and regulations of the City, and the Federal Aviation Agency, except that Lessee may not operate a public automotive service station nor dispense automobile gasoline, lubricants or propellants to the public. Said automotive operation is restricted to the Lessee's equipment and the servicing of rental autos.
8. To use, in common with others authorized to do so, common areas of the Airport, including runways, taxiways, aprons, and other conveniences provided for public use for the take-off, flying, and landing of aircraft.
9. In or upon said demised premises, to locate, maintain and operate shops for limited or full repair, maintenance and/or overhaul of aircraft, or aircraft components including the storage and sale of aircraft parts, accessories and airmen's supplies, materials and equipment.
10. To store aircraft for others, either in a main hangars, tee hangars or tie down area.
11. To manufacture aircraft or allied parts and components."

Leases were issued to three fixed base operators, namely, the plaintiff, Pan Ark Aviation, and Flower Aviation. All three leases authorized the lessees to engage in all of the activities set forth above.

Since there was only one fuel storage facility to store fuel on the airport to supply the customers of the fixed base operators, each lease contained the following provision:

> "The lessee agrees to purchase from the City all aviation gasoline or propellants dispensed through lessee's operation at the City's cost plus five cents per gallon."

This was modified in 1974 to increase the charge from five cents to five and one-half cents per gallon.

The City assumed the responsibility for providing and maintaining the storage facility, monitoring the quality of fuel, providing fire protection and delivering to and maintaining in the storage facility the fuel supplies to serve the needs of the fixed base operators and certain other aircraft using the airport who were not supplied by the fixed base operators.

Assuming but not deciding that the City's dealings with the fixed base operators violated the Federal Antitrust laws in one or more ways alleged in the complaint, we now address the legal question of the City's immunity from the Federal Antitrust laws in the light of the foregoing uncontroverted facts.

CASE LAW ON IMMUNITY

The *Parker* Doctrine which is the basis for immunization of state action from the Federal Antitrust laws was established by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). The doctrine has been the subject of interpretation in many later decisions of the federal courts, including the United States Supreme Court.

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., et al, ____ U.S. ____, (48 U.S.L.W. 4238) (March 3, 1980) hereinafter referred to as *"Midcal"*, is the most recent decision of the Supreme Court dealing with the

Parker Doctrine. In that decision, the Court set forth two requirements for state immunity;

1. That the state action be clearly articulated and affirmatively expressed as state policy; and,

2. That the policy be actively supervised by the state itself.

However, in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978) the City was held not immune from an antitrust action arising from the operation of a municipally owned and operated electric power utility. In *Lafayette*, the plurality opinion recognized that in certain circumstances a municipality may be immune from antitrust violations. The opinion states:

> "While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Lafayette* (supra) at page 415.

The Tenth Circuit Court of Appeals in *Community Communications Company, Inc., v. City of Boulder*, ____ F.2d ____ (Case No. 80-1348) decided May 28, 1980, held the City of Boulder (a Home Rule City) immune from the Federal Antitrust laws.

In that case, the plaintiff's complaint was directed to a city ordinance placing a moratorium on expansion of plaintiff's cable T. V. business and to the action of the city in soliciting others in the cable T. V. business to engage in that business in the City under a proposed model ordinance. Plaintiff claimed these actions were in violation of the Federal Antitrust laws.

In holding the city immune under the *Parker* Doctrine, the opinion reviewed both the *Lafayette* and *Midcal* cases.

The Tenth Circuit concluded the two tests set forth in *Midcal* had been met.

With reference to the *Lafayette* case, the Tenth Circuit opinion states:

> "The decision, considering the separate opinions, was grounded on the fact that the action was not directed or authorized by the state pursuant to state policy to displace competition with regulation or monopoly public service." (P. 9 slip opinion.)

The Tenth Circuit opinion cites the pertinent provisions of Article XX, Section 6 of the Colorado Constitution which we have set forth above and then states:

> "The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power. *See* the references in City and County of Denver v. Henry, 38 P.2d 895 (Colo.), to the situations where an ordinance may even supersede a state statute as to matters of purely local concern. *See also* Service Oil Co. v. Rhodus, 500 P.2d 807 (Colo.), and

> Davis v. City and County of Denver, 342 P. 2d 674 (Colo.). In any event, we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City.
>
> "The Colorado Supreme Court has considered the scope of the Colorado version of home rule in several other cases including Veterans of For. Wars, Etc. v. Steamboat Springs, 575 P. 2d 835 (Colo.), Security Life and Accident Co. v. Temple, 492 P. 2d 63 (Colo.), and Four-County Met. C. I. Dist. v. Board of County Com'rs., 369 P.2d 67 (Colo.). In the *Four County Metro* case the court stated that the home rule cities in Colorado as to local matters had the complete authority."

In other words, municipal policy exercised by a Home Rule City in Colorado is the equivalent of "state action" when exercised in connection with municipal affairs.

In view of the fact that the state of Colorado has specifically authorized a city to acquire and operate a municipal airport and that such acquisition and operation "are hereby declared to be public, governmental functions, exercised for a public purpose and matters of public necessity - - -", complete sovereignity has been granted by the Constitution to Home Rule Cities and the Court is satisfied that the City of Pueblo in its dealings with plaintiff and the other fixed base operators was acting in a governmental and not in a proprietary capacity.

The Pueblo Airport is located outside the territorial limits of the City of Pueblo. The plaintiff contends:

> "Since the airport is outside the corporate limits, when Pueblo operates the airport it is not exercising home rule authority."

This contention is without merit.

In 1931, the legislature authorized cities

> "to acquire, establish, construct, own, control, lease, accept, improve, maintain, operate, and regulate airports and landing fields for the use of airplanes and other aircraft either within or without such municipalities - - -." 1931 S. L. p. 788; C.R.S. 1973, §41–4–201.

In 1945, the state legislature in authorizing municipal and county airports stated:

> "All of the powers, rights and authority granted to counties by this act and to cities and towns by any other law may be exercised and enjoyed by such counties, cities and counties, cities and towns, acting jointly, either within or without the territorial limits thereof, without regard to the distance said airport may be located from the boundary of any such city or town." 1945 S. L. p. 39.

Article XX, Section 6 provides in pertinent part:

> "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded

> by the charters of such cities and towns or by ordinances passed pursuant to such charters."

Thereby the powers granted to a municipality which is chartered under the provisions of Article XX of the state constitution and not superseded by the charter of the Home Rule City are incorporated as a part of the powers which are granted by the constitution to a Home Rule City.

Pueblo's latest Charter adopted in 1954 provides in Section 1–3:

> "By the name of Pueblo, the City shall have perpetual succession and shall have all the powers granted to municipal corporations and to cities by the Constitution and general laws of this State together with all the implied powers granted."

The Court cannot concur with the conclusion of the plaintiff that the City of Pueblo in operating its airport outside the corporate limits of the City of Pueblo was not exercising Home Rule authority.

We conclude that the City of Pueblo in its dealings with the fixed base operators is immune from the Federal Antitrust laws. Since all antitrust claims of the plaintiff against all the remaining defendants are based on alleged violations by the City of the Federal Antitrust laws, the immunity of the City requires the granting of the defendant's motions for summary judgment of dismissal and the dismissal of this action with prejudice as to all defendants.

If the Court's ruling on the immunity question is correct, no further consideration of the summary judgment motions is necessary.

If, however, the Court's ruling on immunity should be reversed on appeal, the other questions raised by the motions for summary judgment will remain undetermined by the appellate court.

Therefore, the Court believes it highly desirable that it rule on all questions raised by the summary judgment motions in order that upon appeal, the appellate court can review the Court's ruling on all questions raised by the summary judgment motions if this Court's ruling on the question of immunity should not be affirmed.

By so doing, if this action is remanded for trial, the trial court and the parties can proceed with the trial in the light of the appellate court's affirmance or reversal of each of the trial court's rulings on each of the plaintiff's antitrust claims.

We therefore consider and determine the motions for summary judgment separately as to each of the plaintiff's antitrust claims.

PLAINTIFF'S ANTITRUST CLAIMS

Rule 56(e) of the Federal Rules of Civil Procedure governs the Court's consideration of the motions for summary judgment.

It provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served

> therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In considering the motions for summary judgment, the Court is well aware of the general rule established by the United States Supreme Court that "summary procedures should be used sparingly in complex antitrust litigation - - -." *Poller v. Columbia Broadcasting System, Inc., et al.*, 368 U.S. 464, 473 (1962).

We do not believe that this rule relieves the plaintiff of its obligation under Rule 56(e) to "set forth specific facts showing that there is a genuine issue for trial."

Nor do we believe that the Supreme Court rule relieves the trial court of its duty to review and consider the materials filed by the parties in support of and in opposition to the defendants' motions for summary judgment, to determine whether or not such material reveals specific facts showing that there is a genuine issue for trial.

The material submitted by the parties is quite voluminous, consisting of affidavits, six depositions containing over 650 pages of testimony, letters, proceedings of the City Council and other documents before the Court.

The Court has reviewed and considered this material as

well as the briefs and the oral arguments of council and makes the following determinations.

FIRST AND SECOND CLAIMS

These claims seek relief from the City and Lopez, the Director of the Airport.

The claims are based on the provision contained in the plaintiff's lease requiring the plaintiff to purchase from the City, at the City's cost plus five cents per gallon, all aviation gasoline or propellants dispensed by plaintiff through its operation.

There is no issue of material fact. Admittedly, the leases under which the plaintiff operated from 1970 to June 31, 1977, provided that the lessee was required to purchase all aviation gasoline or propellants from the City.

The reasons for the inclusion of this clause in the leases of the fixed base operators are not in dispute.

In 1948, the airport property was acquired from the Federal Government for the purpose of establishing and operating a public airport. The City then leased portions of the property to certain fixed base operators for the non-exclusive right to sell new and used aircraft; to conduct a school for the purpose of teaching flying; rental of aircraft to others; to charter aircraft; to dispense aviation and automobile gasoline and lubricants or propellants; to operate shops for repair, maintenance, and overhaul of aircraft; to store aircraft; and to manufacture aircraft or aircraft parts or components.

At the time the City acquired the airport, there existed an underground fuel storage facility which the City repaired, maintained and modified and continued to use as the air-

port's only fuel storage facility. It was located away from the terminal buildings and ramp area.

The City on a daily basis, monitored the fuel in order to control and assure its quality before it was dispensed by the fixed base operators.

The City purchased the fuel through competitive bidding. The supplier delivered the fuel to the storage facilities at the airport where it was dispensed to the customers of the fixed base operators and other users.

There is no evidence that the plaintiff or the other fixed base operators during the period of time here involved offered to build their own storage facilities at an appropriate place on the airport and thereby to obtain and store a supply of fuel from sources other than the City.

Upon the basis of these undisputed facts, the Court concludes that the exclusive dealing clauses in the plaintiff's leases did not violate either 15 U.S.C. §14 or 15 U.S.C. §1 and that the City's motion for summary judgment of dismissal of the first and second claims for relief should be granted.

With respect to the defendant, Lopez, it is undisputed that he did not assume the position of director of the airport until the year 1976 and the plaintiff has submitted no evidence, documentary or otherwise, that Lopez participated in any manner in the City's decision to include the exclusive dealing provisions in the plaintiff's lease or the leases of the other fixed base operators.

The plaintiff's lease was entered into in 1967 and plaintiff acquired it in 1970. The lease was extended in 1972 for an additional five years under an option contained in the original lease.

Assuming that the exclusive dealing clause was violative of the antitrust laws or any portion thereof, there is no factual or legal basis upon which Lopez could or can be held personally liable therefor.

The Court concludes that the motion of Lopez for summary judgment of dismissal of the plaintiff's first and second claims should be granted.

FOURTH CLAIMS A AND B

The Fourth Claim A of the original complaint states in pertinent parts:

> "Between January of 1974 and June of 1977, the following major services were available to aircraft customers at the Pueblo Memorial Airport on a competing basis: Plaintiffs and Flower Aviation, Inc., competed in fueling and lubrication; Plaintiffs and Pan Ark Aviation, Inc., competed in the maintenance and repair of aircraft and Plaintiffs and Pan Ark Aviation, Inc., competed in giving student flying instructions.
>
> "That on or about January of 1974, the Defendants and each of them, did conspire with each other, to eliminate Plaintiffs as a competitor in the foregoing major services provided at the Pueblo Memorial Airport.
>
> "That the Defendants did take the following overt actions in furtherance of the conspiracy referred to above:
>
> "a. In February of 1974 The CITY OF PUEBLO refused to deliver

Plaintiffs' aviation fuel which Plaintiffs by Lease was (sic) prohibited from purchasing from another party but nevertheless delivered to FLOWER AVIATION, INC. all fuel which FLOWER AVIATION, INC. desired;

"b. In the latter part of 1974 The CITY OF PUEBLO constructed a new building for FLOWER AVIATION, INC. which it rented to FLOWER AVIATION, INC. at a rental far below the market value for said building and far below the cost of amortizing said building over any reasonable period.

"c. In 1976 aircraft hangars rented by Plaintiffs and FLOWER AVIATION, INC. were damaged by a windstorm. The CITY OF PUEBLO repaired the hangar rented by FLOWER AVIATION, INC. but has failed and refused to repair the hangar rented by the Plaintiffs.

"d. In April of 1977 plaintiffs' lease expired on the land it leased and from which it operated its business at the PUEBLO MEMORIAL AIRPORT. The CITY OF PUEBLO placed said Lease up for bids. The Leases of FLOWER AVIATION, INC. and PAN-ARK AVIATION, INC., being longer than Plaintiffs' Lease, had not expired at that time and were not due to expire for (10)

years hence. The conditions of said bid were such that Defendant PAN-ARK AVIATION, INC. was able to outbid the Plaintiffs for the land formerly occupied by the Plaintiffs.

The Court refers to this claim as Fourth Claim A or the 1974 conspiracy.

By amendment to the complaint, the plaintiff alleges:

"That between October 1976 and January 1977, George Rabatin Jr., representing and acting on behalf of Pan-Ark Aviation Inc., and Thomas Lopez, representing and acting on behalf of the City of Pueblo, did meet together and did conspire to place the premises occupied by Plaintiffs at Pueblo Memorial Airport up for bid and to impose such conditions upon that bid that the Defendant, Pan-Ark Aviation Inc. would be successful in obtaining said bid for the following purposes: to eliminate Plaintiffs as a competitor at Pueblo Memorial Airport; to permit Pan-Ark Aviation Inc. to expand into the lease occupied by Plaintiffs; and to permit Pan-Ark Aviation Inc. to use Plaintiff's fuel allocation at Pueblo Memorial Airport."

For convenience, the Court refers to this claim as Fourth Claim B of the 1976 conspiracy.

FOURTH CLAIM A

This claim seeks relief from all defendants.

The Court's review of the material submitted in support of and in opposition to the motions for summary judgment reveals no facts which directly or by inference support the plaintiff's allegation that the defendants entered into a conspiracy to eliminate plaintiff as a competitor in the major services provided at the airport by fixed base operators or support the allegation that the overt acts set forth in the complaint were done in pursuance of such a conspiracy.

The uncontroverted facts revealed by the material are as follows:

All three fixed base operators were authorized by their respective leases to engage in all of the same activities including fueling and lubrication, maintenance and repair of aircraft and giving student flying instructions.

Both Mr. and Mrs. Teel state in their depositions that they know of no agreement or other acts constituting the alleged 1974 conspiracy. (Willard Teel Deposition, pp. 148–151 and Betty Teel's Deposition, p. 31). As to the allegations of overt acts by the City as alleged in paragraphs 5 (a), (b), and (c), the following uncontroverted facts appear from the materials filed in connection with the summary judgment motions.

As to the allegations in (a), in February 1974, the sale of aviation fuel was restricted by the Federal Government and the City received a limited allocation. The City in turn allocated available supplies to the fixed base operators on the basis of the amount of previous purchases. (Deposition of Mrs. Teel, p. 44.)

As to the allegations in (b), the materials reveal the original buildings occupied by Flower Aviation were old and in poor condition and the City desired to replace them. In 1974, Flower proposed to the City that it would build an

addition to the existing terminal building to be used by Flower in place of the old buildings it occupied. This proposal was not completed because Flower could not finance the construction of the new building. The City then agreed to build the new building and lease it to Flower and the present buildings would be demolished by the City. (Weisbrod Deposition pp. 15–18). The new building was constructed and the City entered into a lease with Flower for twenty years with an option to renew the lease for an additional ten years at a rental which the City determined would recapture the cost of the new building.

With respect to paragraph (c), the uncontroverted evidence is that in 1976, considerable wind storm damage to the buildings occupied by the fixed base operators occurred. Flower's buildings were relatively new and were repaired. The buildings occupied by the plaintiff were so old and deteriorated that major repairs were not justified. Plaintiff in May 1974, in a letter to City Manager Weisbrod, stated "- - - I would like to point out the hangar is probably beyond economical repair." (Exhibit 7 attached to City's motion for summary judgment.)

Upon the foregoing uncontroverted facts, and the failure of plaintiff to set forth any specific facts showing that there is a genuine issue for trial of its Fourth Claim A, the Court concludes the defendants' motion for summary judgment of dismissal of Fourth Claim A should be granted.

FOURTH CLAIM B

The amendment to the complaint alleges that between October 1976 and January 1977, George Rabatin, Jr., acting on behalf of Pan Ark, and Lopez, acting on behalf of the City of Pueblo,

> "did meet together and did conspire to place

> the premises occupied by plaintiff - - - up for bid and to impose such conditions upon that bid that defendants, Pan Ark - - - would be successful in obtaining said bid - - -"

and thereby eliminate plaintiff as a competitor and permit Pan Ark to expand on to the lease occupied by plaintiffs and to use plaintiff's fuel allocation.

In order to accomplish the purposes alleged above, there must first have been a conspiracy between Pan Ark and the City, first to get the City to put the plaintiff's leased property up for public bid and secondly, to get the City to include in the bid the requirement that the successful bidder provide a new building to replace hangar No. 4.

The plaintiff has offered no specific facts to support these alleged conspiracies.

The uncontroverted facts before the Court are that on February 4, 1975, a year before Lopez became director of the airport, the Department of Transportation, through the Federal Aviation Agency, notified the City as a follow up to a compliance review pursuant to Title VI of the Civil Rights Act of 1964:

> "Although the leases contain renewable provisions, I recommend that you continue to notify OMBE and the minority business community in Pueblo of opportunities available as airport concessionaires, and that bids be solicited from qualified minority firms and awards made without regard to race, color or national origin."

In 1976, Rabatin, Jr., became a stockholder and general manager of Pan Ark. Pan Ark's leasehold adjoined that of

the plaintiff. Pan Ark decided that it needed additional hangar space. Rabatin, Jr., and Charles Hedrick, stockholders of Pan Ark, talked to Lopez about their needs and their plans to provide an additional hangar on Pan Ark's then existing leasehold. Both Rabatin and Hedrick met with Lopez, discussed their plans, and asked that Pan Ark's leasehold be surveyed so they could plan for the construction of a new hangar on their leasehold. The survey was made and Rabatin, Jr., contacted some companies engaged in constructing hangars.

There is no evidence of any discussions between Lopez and Rabatin, Jr., about the subject of putting the plaintiff's leasehold up for bid when plaintiff's lease expired or what the terms of the bid proposal by the City would contain. On March 14, 1977, the City Council adopted Resolution No. 3932 stating that the City is committed to compliance with Title VI of the Civil Rights Act and stating:

> The leasing and/or granting of licenses to persons, firms or corporations for the use of available airport facilities be made by solicitation of bids including notification to the Colorado Economic Development Association , an affiliate office of the Office of Minority Business Enterprise, as well as the minority business community of Pueblo, and the award of such leases and/or licenses be granted without regard to race, color, religion, sex or national origin."

On April 5, 1977, at an informal meeting of the City Council which was attended by Mr. Teel representing the plaintiff and Mr. Rabatin, representing Pan Ark, Mr. Weisbrod, the City Manager.

> "noted that Pueblo Aricraft Service lease is expiring and a 90-day extension was given so

everyone can comply and it will be going for bids on May 15 for the granting of a new lease, or proposal for that fixed base operation."

The fixed base operation referred to was that being conducted by the plaintiff.

Also at this meeting, proposed minimum standard requirements for leases and concessions at the airport were discussed.

The City Manager, Mr. Weisbrod, said it would be in the best interest of the City to demolish hangar No. 4 located on plaintiff's leasehold.

On May 17, 1977, proposed minimum standards were discussed at a meeting of the City Council and later adopted. The minimum standards required lessees to lease or construct adequate buildings to carry on the activities of the lessee.

The minimum standards so adopted were furnished to prospective bidders together with the City's proposed "Operating Agreement and Land Lease." The "Proposed Operating Agreement and Land Lease" in Paragraph 2.32 provided:

> "The City of Pueblo will demolish the existing hangar located on Parcel 1 (Exhibit "A") within sixty days of the date hereof so that the Lessee may construct or lease a building of at least 11,000 square feet total useable space. An office, pilot's lounge, rest rooms, and student's class room will be required (approximately 3,000 square feet). A maintenance shop and aircraft hangar space should accomodate at least five aircraft. A minimum of 2400 square feet is required for a main-

tenance shop."

There were two bids submitted, one by the plaintiff, and one by Pan Ark. Plaintiff, in its bid, attached the following:

> "Pueblo Aircraft, Inc., must exclude the following paragraphs from the lease proposal for the following reasons:
>
> "Paragraph 2.32 - Demolishing the existing hangar located on parcel one and requiring an 11,000 square foot building imposes an impossible financial requirement. Pueblo Aircraft Service, Inc., will make a determined effort to solve the building problem and erect an adequate facility as soon as possible."

Pan Ark's bid contained no such exclusions. Pan Ark's bid was accepted by the City as being the best and highest bid and the lease between the City and Pan Ark was executed.

The plaintiff has failed by affidavit or otherwise to offer any specific facts supporting its allegation that the actions of the City Council in placing plaintiff's leasehold up for bid or including in the bid proposal that the successful bidder would be required to provide a new hangar on the leasehold and hangar No. 4 would be demolished by the City, were the result of a conspiracy between Lopez and Rabatin, Jr.

Having failed to set forth specific facts supporting the alleged conspiracy, the Court is of the opinion that defendants' motion for summary judgment of dismissal of the Fourth Claim B should be granted.

FIFTH CLAIM

By this claim, the plaintiff alleges:

A. The City refused to renew plaintiff's lease.
B. The bid proposal required the successful bidder to construct a new hangar to replace hangar No. 4.
C. That because Pan Ark already had a building on its leasehold, it was able to outbid the plaintiff.
D. That the effect of Pan Ark's successful bid was to create a monopoly in Pan Ark, in the services of repair and maintenance of aircraft and student flying instruction and constituted a violation of 15 U.S.C. §1.

The admitted facts are:

1. The plaintiff's lease by its terms expired on June 31, 1977.
2. The bid proposal required the successful bidder to construct a new hangar to replace hangar No. 4.
3. Pan Ark already had a building on its leasehold.
4. Pan Ark desired to have and made plans to provide additional hangar space on its present leasehold. Pan Ark bid on the plaintiff's former leasehold with the intent that if it was the successful bidder, it would erect the new hangar it desired on plaintiff's former leasehold.
5. That plaintiff refused to comply with

that portion of the bid proposal which required that the City demolish the existing hangar No. 4 and that the successful bidder would provide a new building on the plaintiff's former leasehold.

6. After Pan Ark was awarded the lease on plaintiff's former leasehold, there remained two fixed base operators, Pan Ark and Flower Aviation, both of whom were authorized to engage in and compete for repair and maintenance of aircraft and the giving of student instruction.
7. The Pan Ark lease contains no provisions giving Pan Ark the exclusive right to engage in the repair and maintenance of aircraft and the giving of flying instruction.
8. The Pan Ark lease does not exclude any other person from applying for a lease on unleased land at the airport to engage in fixed base operations, including the furnishing of those services and nothing in the lease of the two remaining fixed base operators prevents the City from entertaining such a proposal and submitting it for public bid.

Upon these admitted facts, the Court concludes that the granting of the lease to Pan-Ark did not create a monopoly in the services of repair and maintenance of aircraft and student flying instruction in violation of 15 U.S.C. §1.

The Court concludes that the defendant's motions for

summary judgment of dismissal of the Fifth Claim should be granted.

ORDER

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment of dismissal are hereby granted and that final judgment of dismissal of this action and the complaints therein with prejudice shall forthwith enter as to all defendants and that final judgment in favor of the defendants and against the plaintiff for the defendants' costs to be taxed by the Clerk of the Court upon the filing of a bill of costs within ten days from this date, be forthwith entered.

Entered this 26th day of September, 1980.

BY THE COURT:

/s/ Judge Chilson
Senior United States District Judge

APPENDIX D

The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

Colorado Revised Statutes §41–4–101 is set out in Appendix D.

APPENDIX E

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, 15 U.S. Code §1.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act, 15 U.S. Code §14.